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No. 86-120

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

DOROTHY ELLENDER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents' primary contention (Br. in Opp. 23-35) is that our petition seeking review of the court of appeals' final judgment in Docket No. 85-6332 (2d Cir. Apr. 28, 1986), is precluded by our failure to petition for review in Docket No. 85-6274 (2d Cir. Jan. 15, 1986). Respondents' contention is altogether meritless.

It is of course entirely clear that the government is not required, on pain of losing its right to seek review in this Court of any given issue, to petition for certiorari from the first appellate court determination of that issue. See, *e.g.*, *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984); cf. *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980) ("[I]t is irrelevant that the [court below] reached [its] holding by relying on its earlier decision * * *. An appeal under [28 U.S.C.] 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional * * * not just for the first such decision."). In the instant case, we are seeking review of the court of appeals' holding in Docket No. 85-6332, that is, its disposition of our appeal

from the district court's denial of our motion for entry of final judgment on the merits. Respondents' contention in essence is that it was legally impossible for us to seek certiorari from the court of appeals' judgment in No. 85-6332 because (1) the panel in No. 85-6332 relied on the reasoning and holding of the panel in No. 85-6274, and (2) we declined to seek certiorari from the court of appeals' judgment in No. 85-6274. There is no support in law or logic for this contention.

Respondents rely (Br. in Opp. 26) on the principle that the time to petition for certiorari "is not extended merely because the court of appeals issue[s] a subsequent order in the same case" that does not substantially change its original judgment. But that principle is plainly inapplicable here. The court of appeals' order dismissing the appeal in No. 85-6332 was not, in either form or substance, a "subsequent order" in No. 85-6274 or an amendment of the judgment in that earlier case. The two cases were distinct appeals, seeking review of distinct actions of the district court; the cases were separately briefed and were heard and decided by different panels of the Second Circuit. Our petition for certiorari seeks review of the court's judgment in No. 85-6332. Since in deciding No. 85-6332 the court of appeals relied on its analysis in No. 85-6274, our petition discusses that analysis. The fact remains, however, that the court of appeals considered and decided two separate appeals, and the government's decision not to seek review in this Court of the judgment on the first appeal in no way forecloses our petition for a writ of certiorari from the judgment on the second appeal. See *United States* v. *Clark, supra.*

In any event, as we have explained previously (Pet. 11 n.8), the question presented in our petition—whether the court of appeals erred in failing to direct the district court to enter a final judgment on the merits—could not properly have been raised in a petition seeking review of the judg-

ment in No. 85-6274. Our position throughout this litigation has been that the district court is required to enter a final judgment on the merits that complies with the Federal Rules of Civil Procedure. We accordingly informed the court of appeals in No. 85-6274 that our notice of appeal on the merits in that case had been filed, as a protective matter, "in anticipation of the entry of a final judgment on the substantive claims in this litigation" (Memo of Law in Opp. to Plaintiffs-Appellees' Mot. to Dis. 20). Because we believe that our appeal on the merits in No. 85-6274 was premature, we do not take issue with the court of appeals' *judgment* dismissing that appeal, but only with its rationale. The judgment with which we do disagree is the court of appeals' judgment in No. 85-6332, whereby it refused to order the district court to enter a final judgment on the merits, and it is from the court of appeals' judgment in No. 85-6332 that we have properly and timely sought certiorari.

Respondents' alternative suggestion (Br. in Opp. 32) that we should have sought certiorari from the court of appeals' denial of our mandamus petition is equally untenable. Such a petition for certiorari could properly have presented only the question where the court of appeals abused its discretion in denying our request for mandamus—not whether a final judgment had been entered. Given the stringent standards governing mandamus (see, *e.g., Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will* v. *United States*, 389 U.S. 90, 95 (1967)), the abuse-of-discretion issue obviously is distinct from the question whether the court of appeals erred in concluding that the judgment on the collateral matter of attorney fees constituted the final judgment on the merits of the case. Indeed, courts often rule for a party on appeal after denying a request for mandamus. Given the pendency of our appeal in No. 85-6332 at the time the mandamus petition

was denied, it was proper for us to follow the regular course by allowing the court of appeals to decide that appeal prior to seeking certiorari.

2. Respondents offer virtually no response to our explanation of why the decision below merits review by this Court. Respondents do not mention Fed. R. Civ. P. 79(a), which requires that the docket sheet show the substance of a judgment; instead, they think it sufficient that the district judge sent the court clerk an internal and nonpublic memorandum expressing his determination that "this judgment closes this case" (Pet. App. 7a; see Br. in Opp. 44). Respondents do not discuss our contention that the court of appeals improperly relied on the district court's intent, a reliance that conflicts with the purpose of Fed. R. Civ. P. 58 and the decisions in other circuits (see Pet. 14-17). And respondents do not mention the Rules' policy of encouraging clarity in judgments and of preventing parties from facing the alternatives of losing their appeal rights or filing blizzards of protective appeals.

Instead, respondents fault the Secretary for "failing to keep track of his own multiple efforts to obtain identical relief" (Br. in Opp. 22), and suggest (*id.* at 33) that we are seeking "repeated bites at the apple to appeal."[1] We of course agree that we have made "multiple efforts to obtain

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[1] Respondents' related assertion is that a party under our analysis would be able to move in the district court for a "new" judgment at any time, and then take a timely appeal from the denial of that motion, thus rendering "the finality of judgments unsettled" (Br. in Opp. 33-34). But we make no such claim. What we sought here is not a *new* judgment on the merits, but the entry of an *initial* final judgment. The district court itself recognized that no such final judgment had ever been entered; it simply concluded that one was unnecessary (Pet. App. 19a n.1).

identical relief," efforts that we properly undertook to protect the interests of the United States. And we agree that the consequence of our protective efforts is a record that is procedurally quite complex. What the complexity of the record demonstrates, however, is the procedural morass likely to result when a district court fails to issue a document that is unambiguously a "final judgment" on the merits of the case.[2] The steps necessary to comply with the requirements of Rules 58 and 79(a) are remarkably simple. The district court was unjustified in refusing to take those steps, and the court of appeals erred in sanctioning its refusal.[3]

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[2] As we noted in our petition (at 20), neither the district court nor respondents were able to identify with certainty a single document that constituted the "final judgment" on the merits. Respondents argued below that *either* the December 1984 order disposing of their damages claims *or* the January 1985 order respecting the attorney fees represented the final judgment, and the court of appeals opted for the latter (Pet. App. 8a). But the district court itself did not regard its attorney-fee judgment as the final judgment on the merits; six months after entering the attorney-fee judgment, the district court "note[d] that a formal judgment was never entered after [the] November 17, 1983 opinion permanently enjoining defendants' challenged practices" (*id.* at 19a & n.1). The district court simply concluded that a "formal judgment" on the merits, incorporated in a separate document, was unnecessary. See *id.* at 14a, 19a n.1.

[3] Respondents also assert (Br. in Opp. 38-42) that we were deprived of our right to appeal not because of any defect in the substance of the judgment entered on January 4, 1985, but rather because of our failure to realize that any judgment had been filed on that date. They speculate that had we known of the judgment respecting the attorney fees we would have recognized that it was final on the merits. We note first that respondents—who submitted the proposed judgment order without notifying government counsel, and who waited until 4 days after our appeal time had expired to request payment of the attorney fees (Pet. 5-6)—are not very well situated to fault the government for its ignorance of the order. In any event, the facts belie respondents' speculation: our Rule 60(b) motion, relying on Fed. R. Civ. P. 54(b), shows that when we did learn of the January 1985 order, we interpreted

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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it as simply determining the attorney-fee issue, and sought reconsideration only on that basis (see Pet. 6-7, 19-20; Pet. App. 18a-19a). And since our Rule 60(b) motion concerned only the attorney-fee portion of the case, we do not understand why respondents charge us with inconsistency (Br. in Opp. 45-47) in abandoning our appeal on that issue.

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